



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-01157

December 6, 2019

Via email: 53560-87201390@requests.muckrock.com

Mr. Jimmy Tobias
MuckRock News
DEPT MR 58611
411A Highland Avenue
Somerville, MA 02144

Dear Mr. Tobias:

On July 23, 2018, you filed a Freedom of Information Act (FOIA) seeking the following:

[A]ll written or electronic communications, including attachments, sent or received by Deputy Assistant Secretary Aurelia Skipwith, or her executive assistant, that contain one or more of the following words or phrases: Endangered Species Act", "ESA", "endangered species", "threatened species", "migratory bird", "MBTA", "sage grouse", "Texas hornshell", "sagebrush lizard", "incidental take", "4(d) rule" and/or "4(d)". This request pertains to records produced between January 1, 2018 and the date this request is processed.

Your request was received in the Office of the Secretary FOIA office on May 9, 2018, and assigned control number **OS-2018-01157**. Please cite this number in any future correspondence or communications with the Office of the Secretary regarding your request. We are writing today to provide an interim response to your request on behalf of the Department of the Interior. Please find attached one (1) file consisting of 569 pages. Of those 569 pages, 549 pages are being released in full and twenty (20) pages contains redactions as described below.

Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552 (b)(5)) under the following privileges:

Confidential Commercial Information

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency" 5 U.S.C. § 552 (b)(5). As such, the Exemption 5 "exempt[s] those documents... normally privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These

privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See id.; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Confidential Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails “where the document contains ‘sensitive information not otherwise available,’ and disclosure would significantly harm the government’s commercial interest.” Id. at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes “intra-agency” documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as “confidential commercial information” because the government entered the marketplace as an ordinary commercial buyer.

In line with Land Bank and Merrill, the information is “sensitive and not otherwise available.” If the information was released, the government’s financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government’s financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Portions of the enclosed documents have been redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Non-public email addresses

Exemption 6 allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The courts have held that the phrase “similar files” involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a “balancing test.” This means that we must weigh the individual’s right to privacy against the public’s right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency’s statutory duties”).
- (3) Finally, we must determine whether the public interest in disclosure is greater than the

Mr. Jimmy Tobias

privacy interest of the individual in withholding.

The information that we are withholding consists of personal information and non-public email addresses, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Tony Irish, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Leah Fairman, Office of the Secretary FOIA Office, is responsible for making this decision.

Sincerely,

Leah Fairman
Office of the Secretary
FOIA Office